

# **REALISING "PARTNERSHIP" IN EMPLOYMENT RELATIONS: SOME LEGAL OBSTACLES**

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## **1. Introduction**

The UK Government's policy on economic and social renewal, the ultimate goal of which is to improve living standards for all, emphasises the importance of adopting a partnership model of industrial relations.<sup>1</sup> Government perceives this model of employment relations as essential to achieving continued competitiveness in a globalised economy, especially where productivity, however measured, does not match that of other major industrialised countries.<sup>2</sup> Narrowing the gap in competitiveness is thought to require businesses and individuals to acquire new skills and knowledge essential to provide higher value-added goods and services.<sup>3</sup> Although there are divergent conceptions of precisely what partnership might entail, at its broadest level it would seem to require a cultural change that encourages greater mutuality and respect for employees. This is offered in exchange for enhanced motivation, 'flexibility' and innovation on the part of employees. Partnership might thus address the manner in which employees are treated, their opportunity to contribute to the workplace, and their commitment to the success of the enterprise.

Within European Employment Strategy, the greatest prominence appears to be given to the campaign for full employment. However, the true position is more complex because, in annual Recommendations addressed to member states as "employment guidelines", the Council of the European Union insists that there should be policies to encourage the adaptability of businesses and their employees. As in the UK these guidelines also emphasise the importance of partnerships to achieve the desired goals. What seems to be envisaged here is a constructive engagement between capital and labour at European, national, local, sectoral and enterprise levels. But European policy transcends social dialogue. The 2001 guidelines<sup>4</sup> oblige member states to introduce measures to ensure that the labour market adapts to structural change in the economy. The guidelines also advance a de-regulation agenda to promote enterprise.<sup>5</sup> As in the United Kingdom, European policy makers are seeking a structural re-invigoration of the economy and of the workplace. The problem is that, by adopting the metaphor of partnership, policy makers are implying that the changes will be mutually managed and of mutual benefit. The guidelines reveal, however conflicting agenda: de-regulation, flexibility and adaptability are not comfortably aligned with ideas of mutual respect and dignity, each of which must be inherent in a partnership approach. As we shall see below, similar tensions pervade policy making in the UK. Thus a preliminary question arises as to what partnership actually means.

The purpose of the present article is to examine this question, and to ask whether a partnership agenda can effectively be realised without important and extensive reforms in the legal regulation of the employment relationship.

## **2. Conceptions of Partnership**

### **2.1 Background**

The decline in collective industrial power and relatively high levels of unemployment for much of the past two decades have enabled employers to make significantly increased demands on employees in the pursuit of successful competition. This may have a short term benefit in an increase in profits, but the tenor of the *Fairness at Work* White Paper<sup>6</sup> seemed to recognise that employees are cynically aware that flexibility is too often a manipulative, one-sided, strategy designed to exploit their economic weakness and dependence. The loss of job security has eroded loyalty as employees realise that the life span of a job will be for a period no longer than that in which the individual offers up to date competencies from which the employer can profit. Long hours have been associated with increased levels of illness, stress and even premature death.<sup>7</sup> Systematic 'de-layering' has removed otherwise predictable career paths, in which some employees may have invested much of their working lives.

A further trend has been the systematic transfer of economic risk to employees. Predictable earnings have been replaced by contingency pay. This may be either profit related or performance related, neither of which is advantageous for employees during times of economic slowdown; either may cause resentment where pay is reduced for causes outside the employees' control. Pay restraint applying to the majority of employees, but not those at the 'top', encourages division that erodes the employees' sense of having a stake in the success of the enterprise. Insecure employees, with

greater responsibilities and less opportunity for reward are unlikely to be fully motivated to innovate, communicate new ideas or support the continuing struggle for competitive advantage.<sup>8</sup>

The effects of the globalised economy exert a major influence on the desired change in the work-place culture. The removal or lowering of tariff barriers has meant that domestic industry has been exposed to more competition from low cost overseas producers. Rapidly developing technologies, ever higher consumer expectations, and a general liberalisation in both trade and capital markets, have demanded that business responds effectively to the re-structured commercial environment and the dynamic upon which it insists.<sup>9</sup> The wealth of the nation increasingly depends on the extent to which it can attract inward investment as production may more easily be shifted around the globe.<sup>10</sup> Employment opportunities are less influenced by location alone and rather more dependent upon an objective assessment of the potential profit that may be won from maintaining or locating production in Britain. These decisions embrace such matters as the availability of relevant skills, their relative cost, and the productivity of the domestic workforce, as well as the efficiency of the transport system and access to relevant product markets. Employment measures necessary to attract internationally mobile investment are sometimes difficult to reconcile with a genuinely compromising vision of the employment relationship. These and other macro-economic policies can be disadvantageous to the interests of workers, thereby tending to reduce their commitment to success. For example, the Government boasts that the absence of social protection for UK workers is an asset to the UK economy. Non-wage labour costs of UK workers are just 13% of total labour costs compared with 15-30% of other G7 countries. Further, the UK has also one of the most lightly

taxed economies in the EU.<sup>11</sup> These policies mean, of course, that there is weaker social security, health and pension protection in the UK than elsewhere - a trend that hints at a lack of recognition of the value in workers as human beings. Nevertheless, the Government concludes that, despite employers' concerns, the regulation (and taxation) of the labour market is "favourable" (from an employer's perspective) compared with other G7 countries.<sup>12</sup>

Against these considerations, the generation of new ideas, as much as their realisation, is a key component in securing competitiveness. To achieve this there must be a greater willingness on the part of employees to undertake problem solving, often in teams. In essence, a closer mutual dependency is emerging in industrial relations, which means that enterprises will be forced to rely increasingly on a committed, imaginative, innovative and co-operative workforce.<sup>13</sup> A major question concerns what policies may be necessary to bring this about, and what legal reforms may be necessary to underpin this new industrial relations climate.

## 2.2 Policies to Promote Partnership

If "partnership" is the British Government's response to the turbulent commercial environment and the potentially de-stabilising experiences of the new flexibility, it is necessary to clarify what policies are subsumed within this chosen metaphor. As we shall see, there are certain differences of opinion as to what this project entails, so the precise meaning of "partnership" poses certain challenges.

It is fundamental to the Government's version that the partnership strategy does not offer a return to job/function security and the predictability of rewards. In place of security the partnership model seeks to motivate employees by other means. In particular, it promises a 'fairer' work-place culture in return for which employers might expect a more stable and effective workforce. Its view also emphasises the need for flexibility on the part of the workforce. This is, in itself, a disputed idea, open to diverse interpretations.<sup>14</sup> However, it almost certainly includes expectations that employees will adapt to new commercial circumstances, that they will not resist new working methods and technologies, and that they should be flexible both as to working hours and locations. It may also require employees to be flexible in the functions they perform. The Government signals that its reading of partnership embraces many of these *desiderata*. In particular it acknowledges that firms will want to organise their work in different ways<sup>15</sup> and that such matters must be regulated by the ebb and flux of the market.<sup>16</sup> At European level member states are offered guidance that they should introduce into their domestic law more 'flexible' types of contract buttressed by only 'adequate' employment security.<sup>17</sup> Within European policy, just as in the UK, flexibility places directly at risk the idea of job and function security in employment.

All versions of partnership share the expectation of a greater commitment to quality, customer care and innovation.<sup>18</sup> This entails more emphasis on high trust relationships where employers control employee outputs through target setting and appraisal rather than through the traditional "input" controls, such as the giving of orders.<sup>19</sup> This is thought to offer a greater capacity to compete by unleashing more

rapid innovation.<sup>20</sup> A further key objective of partnership is the binding of all elements of the skills and knowledge base within an enterprise, so as to promote quality and innovation and ensure their rapid internal transfer and exploitation.<sup>21</sup> Boosting the knowledge economy is also seen as a key strategy in enhancing competitiveness because growth can be seen in industries in which technology is advancing most rapidly. The Government's 'Partnership at Work Fund',<sup>22</sup> having pledged £5m investment from public funds to assist adoption of the new model, emphasises the fundamental value of co-operation. It promotes *inter alia* such matters as joint approaches to problem solving, as well as a "shared culture and shared learning".<sup>23</sup> This invigorated exploitation of the knowledge, commitment and creativity of the workforce is seen as a *sine qua non* in the shift from an industrial to an information society.

There is some empirical evidence to support the Government's view that partnership offers real commercial benefits.<sup>24</sup> Research by D Guest and R Peccei identified that over 65% of companies which claimed to adopt a partnership approach thought that it gave better productivity, better quality of goods and services and an enhanced ability to retain customers.<sup>25</sup> Over half reported that it offered, for example, better innovation and higher overall profitability. Interestingly, in respect of these companies, the authors concluded that the overriding objective was not maximising shareholder value. This is an interesting finding because, in an era of near full employment, businesses that resist the adoption of fair practices will be at risk since the potential for skilled staff being lost to rivals that behave otherwise must be significant.<sup>26</sup>

However, Guest and Peccei's survey<sup>27</sup> also revealed an important divergence of opinion concerning the meaning of partnership. In particular, a question arises over job security, which, as we have seen, was not seen as embraced within a partnership agenda either by the UK Government or at European level. The survey suggested that organisations that saw themselves as embracing partnership also shared with their employees a belief that partnership requires 'long term security for employees'. If employment security is central to ensuring the motivation and commitment to product and service improvement then it follows that the Government's vision, and the policies adopted to implement it, may not succeed. Primarily, there is the risk that insecure employment and rewards will not address the pessimism some employees express about the one-sided reality of partnership.<sup>28</sup> It is not perhaps likely that employees in insecure employment will abandon adversarial attitudes and pledge the necessary commitment to flexibility, innovation and product/service improvement from which they are unlikely personally to benefit. Given this possibility there is a greater onus on the Government to explain why its model is to be preferred.

Guest and Peccei found that the bilateralism inherent in the partnership model means that employees should be allowed to participate either directly or through their representatives in a wide range of matters affecting them in the workplace. For example, direct participation is required in decisions "about their own work" as well as those affecting "personal employment issues". In other more general contexts, such as how work is organised, the participation of workers representatives was considered to be essential. However, as Guest and Peccei recognise, it is unlikely that these practices address the entire scope of necessary strategic re-alignment within the



enterprise. There may be further broad issues comprised within partnership: the existence of reward systems, employability and consultation and information exchange. Such issues inevitably also raise legal questions to which we now turn.

### **3. Legal Impediments to the Promotion of "Partnership": Rewards, Employability and Intellectual Property**

#### **3.1 Introduction.**

If competitiveness in the global economy is to depend on the ability of organisations to create both new products and services, the commitment and motivation of employees engaged in innovation must be assured. A key issue is whether these employees will continue to be willing to use their expertise for the benefit of the employer rather than, for example, by setting up their own businesses in competition with that of the employer, or by simply working for a rival.

The monochromatic agenda of the market model was to treat labour as a fixed cost - essentially to obtain labour at the cheapest possible price - and to minimise future increases in wage costs. But this model is under strain. There will increasingly be advantages in rewarding key or innovative employees, provided that this does not disturb widely held perceptions of fairness. First, we shall consider, in this section, legal controls on pay, employability and rewards for inventions. However, the issue of targeted rewards does not conclude the issue because the benefits of partnership

will not be realised simply by adjusting pay systems for key staff. It is also important that information flows more freely within the enterprise, not only for the benefit of employers who need to be made aware of threats and opportunities, but also to protect employees. We shall therefore examine in the following section how the law governing disclosure by each of the parties requires to be reformed if it is to support partnership more effectively than it does at present. Thirdly, as Guest and Peccei discovered, employees will co-operate more fully if they are involved either directly or through their representatives in the decision making process and we shall consider some important aspects of the legal regulation of consultation and procedural fairness. Finally, we shall consider the broader question of how the common law could respond more effectively to protecting the dignity of the worker.

### 3.2 Pay Systems

*"Businesses are more likely to become entrepreneurial if their employees.....share in the wealth they create".<sup>29</sup>*

The Government is aware that new "incentive structures" will have to be designed to encourage reward and retention, especially (although not exclusively) of intellectual capital. The question arises as to how far it views legal regulation as necessary to achieve this.

Its general agenda in relation to rewards is to avoid regulation, except where it is necessary to provide a bare minimum of safeguards against exploitation by employers. At this basic level of protection the regulatory agenda cannot convincingly be

portrayed as advancing partnership because it betrays a lack of political will to safeguard the interests of many workers in achieving a "fair" wage. Intervention occurs at the 'top' and at the 'bottom'; 'middle' earners' wages remain determined by a market model in which the employer dominates. New Labour is determined not to re-distribute power by restoring to trade unions the coercive economic sanctions largely removed between 1979 and 1993, so that the market power of the employer is equalled. This cluster of policies sits rather oddly with the Government's rhetoric that partnership demands fair treatment, for little is more calculated to destroy mutual trust than the perception that pay policy disguises the double standard that workers' wages must often be restrained for reasons of competitiveness (or an anti-inflation strategy) whilst directors and others can fix their own pay increases at notoriously more generous levels regardless of the performance of their companies during their stewardship.<sup>30</sup> A small step is comprised in the announcement<sup>31</sup> that shareholders will have an annual entitlement to vote on directors' pay. It remains to be seen whether such a control will be effective. It does, however, hint at a realisation that double standards in pay setting are unhelpful in encouraging the mutual goodwill essential to the success of partnership.

For the direct benefit of the very low-paid, New Labour implemented the National Minimum Wage. Few would argue, however, that policies intended to benefit only the very lowest paid of workers are sufficient by themselves to achieve the necessary motivation and co-operation of the workforce as a whole. Moreover, the lack of generosity in the minimum wage rates reveals how diffident Government policy is in the face of orchestrated objections from the employer's lobby. The entitlement to the

minimum adult hourly rate is acquired only by those aged 22 or over despite objections that it should be paid at least from the age of 21, or even 18.<sup>32</sup> The present age limit suggests a rather grudging approach by withholding from many adult workers the protection of the adult minimum wage rate!

The common law has also been unprepared to restrict employers' powers to determine pay policy. Employees who refuse to obey orders, and thereby exert industrial pressure to secure an inflation pay-rise or anything else, commit a breach of contract. The employer, who makes his or her intention to withhold pay clear, can take the benefit of all work done during a pay dispute without payment for it unless employees work normally. This means that they are obliged not only to perform their contractual obligations but also to furnish any goodwill or, at least, not to withdraw it with the intention of causing disruption.<sup>33</sup> There is not even an implied duty to protect employees against the erosion of the real value of the contractual wage as a result of inflation.<sup>34</sup>

Where common law intervention has occurred, its effect, unsurprisingly, is not to venture into pay policy, but to ensure that, where employers have already volunteered a commitment, any conduct purportedly in fulfilment of that commitment is rational and not arbitrary. For example, there is no entitlement to treat employees arbitrarily, capriciously or inequitably in remuneration matters. Any across the board pay increase<sup>35</sup> can be withheld from employees only for sufficient reasons.<sup>36</sup> A problem here has been the lack of commitment to mechanisms to allow employees to know

whether, in comparison with others, their remuneration has been determined for lawful reasons. There has been a long standing right to equal pay between women and men, but it is only in the Employment Bill 2001 that the Government has proposed to introduce the compulsory equal pay questionnaire.<sup>37</sup> Bizarrely, the entitlement to submit a questionnaire is restricted to equal pay claims based on gender discrimination; it leaves part-time and fixed-term staff, who equally share a statutory entitlement to equality with no comparable device.<sup>38</sup>

There is also a more general need for transparency in relation to pay and bonus structures. The limited scope of the Kingsmill Review essentially failed to promote the partnership agenda to which it might have made an effective contribution.<sup>39</sup> Although it exhorted employers to maintain a link between reward and key business objectives, it did not advocate transparency and comprehensive disclosure of pay levels.<sup>40</sup>

The absence of a duty of disclosure in pay matters limits what little common law protection is otherwise available. For example, it is settled that any exercise of a contractual discretion in relation to pay must be a genuine one and not one exercised in bad faith. But this principle is only of benefit if the reasons for a decision are communicated.<sup>41</sup>

The common law has, however, offered some protection for transaction security in relation to bonus payments. This has been a key area where subjectivity is

problematic. Despite the general principles requiring certainty in commercial contracts, in employment contracts the courts have established that a *quantum meruit* action lies to enforce the payment of an unspecified future bonus payment linked to the performance of the employer's business.<sup>42</sup> However, it seems the employer's prerogative to express the rules by which bonuses are calculated, and to alter those rules unilaterally remains weakly regulated and problematic.<sup>43</sup>

Thus the common law project is to establish a framework for redressing some individual wrongs in relation to pay without regulating managerial prerogative to determine general pay policy.<sup>44</sup> This means that, if a wider reform of wages is embraced within the partnership project in order to ensure a greater wealth distribution for the benefit of employees, it seems that this must be achieved within a voluntary rather than a more strictly regulated framework.

### 3.3 Employability

Employability may be central to any version of partnership which does not offer job/employment security. Such a version maintains that employers must be at liberty to dispose of labour, but that employees should be able move more easily between jobs. This is a more limited version of partnership than that identified by Guest and Peccei but it necessarily recognises the importance of employability as a replacement for either job or employment security.

The existing common law duty to provide training exists as a limited implied term requiring the employer to furnish any necessary training or re-training where the

employer has introduced new working methods or techniques.<sup>45</sup> It does not extend to provide training to enhance more general skills, nor to equip the employee with higher level and diverse skills, from which each might derive a benefit.

The Government has proposed, in the Employment Bill 2001 a right to take leave for family purposes related to adoption and paternity. This recognises the importance of allowing time off work within the context of so-called family-friendly measures. The emphasis upon flexibility and innovation suggests however a need for the opportunity to acquire new skills. This is the essence of life-long learning. However, it can be argued that a surprising omission from the Employment Bill is the failure to promote educational goals by allowing time off or leave for study purposes.

This omission is further highlighted by the importance attached to the trade union learning representatives, who advise members on their training, educational and development needs. Their role embraces an important power to encourage employees to pursue educational opportunities not restricted to the employee's current function. However, these officials will necessarily have a limited effectiveness since they exist only in workplaces in which a trade union is recognised,<sup>46</sup> and they function in the absence of a right to time off for study purposes. Since the acquisition of relevant skills may well benefit the employer, as much as it does the employability of the employee, it is surprising that no such right has been proposed in the Bill. Thus the Government's willingness to permit time off for family purposes seems dissonant with its failure to provide a valuable partnership interest in maintaining a highly skilled workforce. This seems regrettable given the acknowledged commitment to

combating international competition by building high performance workplaces.<sup>47</sup> The design of the Employment Bill in this respect seems incomplete.

### 3.4 Inventions and Copyright Works

A major objective of the partnership agenda is to ensure that employees are more fully engaged in product innovation and improvement and more generously rewarded for their achievements. This must be a central issue in which the law should play a positive role, providing a framework in which the wealth created by innovation is justly distributed. Fair reward and job satisfaction will prevent these key workers from lawfully terminating their contracts and either setting up in competition to the employer or working for a rival.<sup>48</sup> Thus the question whether the law adequately ensures that innovative employees receive a just share of the economic benefits of their innovation is a crucial criterion by which the partnership model will be judged. Arrangements that are perceived as one-sided will simply encourage existing workers to find alternative and more rewarding mechanisms for bringing their skills to the market place.

The common law imposed wide implied obligations on employees to deliver up the benefit of any inventions that were relevant to the business of the employer, without reciprocal obligations on employers either to protect and market the invention or to



share its economic benefits with the employee.<sup>49</sup> This was so even if the employment was not primarily for the purpose of furnishing inventions.<sup>50</sup> Employee inventors continue to be regarded as trustees for the employer of the benefit of any invention that is in law the employer's.<sup>51</sup> The common law also vested the beneficial rights to copyright material produced in the course of employment in the employer and not the employee.<sup>52</sup> As in the case of inventions, the decision how to exploit the property right was one for the employer, who was not obliged to share with the employee any economic advantage gained from the work. These common law rules have substantially been enacted so that work produced in the course of employment remains the property of the employer.<sup>53</sup>

The passing into law of the Patents Act 1977 reflected concerns that the national economic interest could be served by stimulating innovation and that this project could be realised more effectively if inventors received a more just distribution of the economic benefit which employers derived from their inventions. However, it is noteworthy that the reform was not extended so as to re-distribute wealth derived from copyright material which, when produced in the course of employment, still vests exclusively in the employer without any reciprocal obligation requiring the employer to share the benefits it produces. In any case, the ostensibly re-distributive scheme of the 1977 Act has been a dismal failure. As we shall see the courts have *inter alia*, construed the statutory requirement of "outstanding" benefit in such a manner that even those who invent a product generating contracts worth tens of millions of pounds have not been entitled to a share of that wealth. There is also a lack of consistency about when ownership vests in the employer. It is this to which we now turn.

### 3.5 Inventions: Ownership

Under ss. 39-41 of the 1977 Act inventions belong to the employer if made in the course of the normal duties of the employee, or duties specifically assigned to him, and the circumstances were such that an invention might reasonably be expected to result from the carrying out of such duties. Employees who make inventions in the course of their duties, and who have a special obligation to further the interests of the employer's undertaking, such as directors, will also be trustees of any invention for their employer.<sup>54</sup>

The first issue is that the courts have not been consistent in their interpretation of the meaning of *normal duties*. According to one line of authority, "normal duties" is to be read more widely than those that merely fall within the contractual job description. Here the emphasis is upon what happens in practice.<sup>55</sup> Although this is capable of casting the net more broadly, so as potentially to capture more inventions for the benefit of the employer, the pragmatic test has also benefited employees whose actual performance is narrower than contractual and other non-binding expectations.<sup>56</sup> This seems appropriate because it would be important to know whether, notwithstanding any express provisions of the contract, the employee was actually given time and resources to enable them to innovate. Accordingly a registrar was not required to hold, for the benefit of the employer, an invention improving an ophthalmoscope notwithstanding that he was employed in a department of ophthalmology in a teaching hospital that had also had a strong research record. The registrar had been expected

(but not contractually obliged) to engage in research but his primary duties involved diagnosing and treating patients. The invention thus occurred outside his normal duties.<sup>57</sup>

However, another decision gave primacy to a tenuous contractual provision rather than the day-to-day functions of the employee. In *Re Staeng Ltd's Patents*,<sup>58</sup> the facts concerned an employee whose dominant function was to serve as a marketing manager. He had, however, an express responsibility to identify a need for new products for existing customers. The contractual obligation to apply his mind to possible new products was held to embrace a developmental role going beyond marketing. Thus the employee's 'normal duties' were held to extend to innovation, notwithstanding the subsidiary and very limited nature of this role. Accordingly, he was obliged to hold for the employer's benefit, an invention he made within the broad field of the employer's business. The effect of this decision was that an employee's 'normal duties' can include development even if the employee receives no facilities for experimentation and development.

However, the problems are not confined to the question of ownership. The rules governing the liability of the employer to pay compensation are also open to objection. Under s.40, where the invention belongs in law to the employer, and the employer derives an "outstanding benefit" from any patent obtained for it,<sup>59</sup> the employee may be awarded compensation, over and above wages paid, in accordance with the compensation scheme in s.41. The distributive effects of the scheme are crucial because, if it is to encourage innovation, it must offer just rewards. Furthermore, effective motivation demands that rewards are certain and, ideally, immediate.

Certainty is important because inventions almost always entail deferred benefits. Indeed, it may be years before an invention moves from the drawing board to the market place and before the product finds sufficient popular demand to be regarded as “outstanding”. As we shall see below, the provision of significant shared rewards for employee inventors is also very far from certain and, for that reason as well, a real doubt arises over the value of the s.40 scheme.

The courts have focused on two related issues in order to deny, in many cases, employees the commercial benefits of their innovations that vest, under s.39, in the employer. The first of these is that the benefit to the employer must be “outstanding” and the second requires this benefit to be identified by reference to the size and nature of the employer’s undertaking. In relation to the first there is also the problem that the benefit must be proved to be outstanding by strict evidence adduced by the employee. As we shall see, employees are unfairly burdened in this respect as they are without access to the necessary commercial information to substantiate their claims.

In order to be “outstanding” the benefit that the employer derives from the patent must exceed that for which the employee has already been remunerated. It is also relevant to examine the extent to which the invention is an essential element of the product rather than a mere improvement of it.<sup>60</sup> “Outstanding” has been held to be a superlative not a comparative term and the burden on the employee making a claim for compensation is a correspondingly onerous one.<sup>61</sup> However, the courts have also warned against re-defining “outstanding” which, it has been held, should be regarded as a question of fact.<sup>62</sup>

The burden of proof that the benefit is outstanding rests firmly on the employee.<sup>63</sup> The difficulties facing the employee are practical as well as evidential. The practical difficulty is assessing the benefit arising from a patent assessed when commercial success may derive from marketing, design and sales expertise or even shifts in consumer preferences. The employer is entitled to recognition for the investment of resources and effort required to develop the idea; high development costs can undermine the employee's claim that a benefit was outstanding.<sup>64</sup>

Employees are also particularly hampered in their claims by the lack of access to commercial information to establish the extent of benefits acquired by the employer. In the *GEC* case<sup>65</sup> the employee argued that the award of contracts for non-patented goods had only occurred because the purchaser was aware of the patents and had an eye on future dealings, but this could not be established in evidence. Similarly, in the *British Steel* case<sup>66</sup> the employee succeeded in showing that some benefits had been acquired, but these could not be quantified and were thus discounted.

An almost overwhelming hurdle in many cases is that the outstanding benefit has to be identified within the context and scale of all the employer's activities. An invention of “outstanding” benefit is not one from which the employer derives a significant benefit in absolute terms, but one that allows the employer to exceed its usual level of commercial activity. For example, if the employer operates a business that regularly deals in multi-million pound contracts, an invention that allows the employer to obtain another multi-million pound contract will not be outstanding. ‘Outstanding’ has, in effect, been re-defined as ‘extraordinary’. In a case in which the employer (a large-

scale defence contractor) won, amongst other contracts a 72 million US dollar contract for the supply of patented equipment actually derived from the employee's invention, the benefit was held not to be outstanding and the employee's claim for compensation was rejected.<sup>67</sup> This was so even though the invention was an essential element of the product. Such an approach suggests a dichotomy between the prospects of success for employees in smaller firms compared with those in larger ones. In the former, a lower level of commercial success should more easily satisfy the 'outstanding' benefit test.<sup>68</sup> A similar advantage probably applies to employees in firms where inventions are not routine. The courts do, however, allow an employee in an appropriate case to demonstrate that the patent was of outstanding benefit to a division of the employer's business rather than to the enterprise as a whole. This must be welcomed for otherwise a significant contribution to a division of a large multinational might otherwise never be viewed as outstanding given the turnover of the entire undertaking.

If the employee inventor surmounts each of the above hurdles the court will order compensation to be paid in an amount determined under s.41. This section also undermines the claim of the employee to a stake in the commercial success of the product. It directs the court to take into account, amongst other matters, the "input" of the employee, such as the effort and skill he or she brought to the invention, rather than the magnitude of the employer's gain attributable to the invention. The statute is thus less concerned with profit sharing than with rewarding effort by other criteria than commercial success.

In sum the existing legal regime is inadequate to fulfil the objectives of partnership that insists on greater internal innovation within firms. It must be asked first whether

there remains any justification for denying employees a share of the benefits derived from their work where copyright vests in the employer and second whether the scheme under the Patents Act 1977 is at all capable of contributing to the partnership agenda by precluding employee innovators in most cases from sharing in the commercial success of the employers' patents.

#### **4. Further Legal Impediments to Partnership: Disclosure, Consultation, Fairness and Dignity.**

##### **4.1 Sharing Knowledge - Disclosure by Employees**

Enhanced competitiveness and a greater success in innovation require the sharing of knowledge within the firm - a goal that the Government has supported with public funds.<sup>69</sup> This is intended, amongst other matters, to ensure product improvement, cascade awareness of opportunities and pool expertise to respond to possible threats. Here, we are concerned with the extent to which the law recognises an obligation that binds employees to share with the employer knowledge acquired during performance of their contract, in particular where the employee is aware that this information would have commercial importance to the employer.<sup>70</sup> This new information, perhaps of a technical kind, is information in which the employer has a vital interest because it may reveal potential threats or opportunities either of which may demand a commercial response.

The positive contribution of the law at a general level to the disclosure of information is weak. This is so because, unless the employee's contractual responsibility is itself to innovate or to advise on the innovations of others, the employee's obligations are

those established under outmoded employment relations models. For example, there are the implied obligations to possess reasonable competence within the job description clause,<sup>71</sup> but not beyond it,<sup>72</sup> and to exercise a reasonable level of skill.<sup>73</sup> Where there is a breach of contract, damages are not awarded according to fiduciary principles so as to deprive the employee in breach of the profits gained provided they are merely exercising their skill.<sup>74</sup> These obligations do not impose obligations either to co-operate or to communicate commercially valuable information to the employer, *a fortiori* where the employee is employed in a capacity outside research and development.

Employers are also unable to rely on the implied duty of faithful service. This has not unequivocally imposed a *general* implied obligation on employees to disclose innovative commercial information to their employers to keep the employer *au courant*. In this context it is difficult to state the law with clarity because the obligations to preserve the confidentiality of certain information elide into the wider duty of fidelity, making the true *ratio* of the decisions uncertain.

Much appears to depend on the facts of each case, including, amongst other matters, the nature of the employee's function. An implied obligation to disclose new scientific knowledge is arguably more readily established in the case of a worker engaged in technical innovation than one who has perhaps administrative duties. However, in the case of the expert employee employed expressly to advise on technical matters, the non-disclosure of information *combined with its use for the employee's own advantage* is a breach of an implied duty to serve in good faith.<sup>75</sup> It is also a breach of confidence for a managing director, who was also an inventor and engineer, to use



information which ought to have been revealed to his employer *to his own advantage*.<sup>76</sup> In each case the employee withheld information for his or her own profit. Thus the breach may concern how the information is used (and thus engage the different obligation of confidentiality rather than any obligation to disclosure internally) rather than its simple non-disclosure. However, after *Cranleigh Precision Engineering*<sup>77</sup> there would also seem to be an obligation to disclose in certain cases. Two questions remain unanswered after this decision: (i) To what extent, if at all, does the contractual disclosure obligation extend beyond directors to ordinary employees? (ii) Does it impose an obligation of disclosure on any employee regardless of the capacity in which they are employed, since the managing director in *Cranleigh Precision Engineering* served as an inventor and engineer?

However, it can be argued that a contractual approach does not exhaust all the possibilities. According to a partnership agenda, a failure to disclose that which might injure the employer, whether regarded as a contractual breach or not, might be seen as misconduct, as would a failure to divulge information that might advantage the employer. This means that if the common law declines to impose an obligation to disclose as an implied term, the partnership approach might embrace non disclosure as a possible reason to justify a dismissal within Employment Rights Act 1996, s.98 (2) (b).

#### 4.2 Sharing Knowledge: Disclosure by Employers

There remains to be considered the contrary aspect of disclosure, that concerning the provision of information to the employee. The highly circumscribed nature of this aspect of the duty of disclosure transfers considerable risk to employees.<sup>78</sup> It raises the question whether the allocation of risk is satisfactory if the partnership agenda is, in part, to encourage employees fully to co-operate with their employer's business objectives. For example, in *Reid v Rush & Tomkins Group plc*<sup>79</sup> an employee who was injured abroad in a road traffic accident whilst on the employer's business found himself in a precarious position. He had not been able to make a claim against the tortfeasor's policy because, in that country, third party insurance was not compulsory. An action for damages against his employer failed because the failure to warn the employee of the local risks was held not to be a breach of contract. The rationale for this decision was the need to avoid imposing an expensive burden on employers who would otherwise be required to forewarn their employees of the complexities of foreign legal and social systems.

Whilst the duty to provide a safe system of working and safe work place normally requires safeguards to be applied in areas over which the employer exercises control, it does not follow that the employer should be without obligations when the employee travels abroad. The court accepted that there were arguments in favour of employers being required by law to provide personal accident insurance for the benefit of employees working overseas, but stated that this could only be achieved by enactment. This issue would seem to be one that the Government should now address.

However the decision in *Reid* does not establish a general rule that employers are never liable for non-disclosure. It might arguably be within the contractual

contemplation of the parties that the employer should be under a duty to communicate such information as is in its possession and not to deny disclosure without good reason where the consequences of such a refusal would place the employee at unreasonable risk. Such a duty could be framed within the existing duty to maintain trust and confidence, since the denial of already acquired information without good cause would suggest conduct capable of destroying mutual trust and confidence.<sup>80</sup>

There is also a more adventurous argument that employers should be under a duty to provide information relating to the function the employee is required to perform abroad. For example, there might be a duty to inform a lorry driver of the weak insurance regulations abroad. It may also be argued *a fortiori* from the reasoning in *Reid* that if the information is expensive and difficult to acquire it is precisely the kind of information the employer rather than the employee should be required to investigate. To hold otherwise is to concede that, in practice, the employee will almost certainly be left in ignorance and thereby exposed to serious risks. This one-sided allocation of risk is a matter that clearly strikes at the heart of the partnership project.

#### 4.3 Consultation and Procedural Fairness

Participation in decision-making, whether direct or by way of representation, is identified by Guest and Peccei' as central to partnership. This model of partnership demands, if not a re-distribution of power, at least enhanced influence of employees within the decision-making process. Enhanced communication within which the employer is prepared to consider alternatives falls squarely within a partnership model because of its mutual advantages. Apart from promoting individual autonomy,

participatory rights also place before the employer information about the employee's perceptions of proposed change, and may provide acceptable alternatives which impact less on their working lives. More pragmatically, by affording the individual some influence over the outcome through dialogue and a manifest willingness to accommodate employee interests in so far as is practicable, the employer may make any adverse outcomes more acceptable to employees, and thereby reduce the risk of disruption. Rather discouragingly, the authors' study suggests that the level of direct participation in British Industry is still low.<sup>81</sup>

The adoption of the Common Position on a new framework Information and Consultation Directive<sup>82</sup> reveals that the European institutions continue to promote dialogue as a means of generating substantive benefits for employers as much as for promoting a measure of autonomy and dignity in the workplace. The purposes of the proposed Directive are stated to include *inter alia* the improvement of risk anticipation and greater flexibility in work organisation, as well as ensuring that employees are aware of the need to adapt. Most significantly, and perhaps in response to the altered commercial environment, employees are offered a *quid pro quo* for the anticipated job and function insecurity that promotes the involvement of employees in the operation of the firm. The new emphasis is upon employability rather than job security. More investment is to be made in training and skills development so that, if redundancy occurs, the transition into alternative employment is eased. It acknowledges that flexibility is unavoidable, but recognises the need for measures to equip employees so that they can be adaptable. In addressing the fear, especially amongst older workers, that "flexibility" entailing job losses consigns them to long

term economic hardship and unemployment, the Directive seeks to remove what might otherwise be strong resistance to the new environment. Accordingly, the Directive places a strong emphasis on encouraging employers to divulge information about possible threats and allow access to training to improve the capacity of the firm to meet the threat and to improve employability for those workers made redundant.

The Directive extends the range of matters about which there should be an exchange of information and consultation. Major advances concern the obligations to inform and consult about significant threats likely to lead to changes in contractual relations, especially where there is a threat to employment.<sup>83</sup> Employers must also provide more information about current and future economic prospects. Individual participation in decision-making is not, however, by the Directive.

A critical component of "partnership" must be the extent to which employers give weight to, and are influenced by, the employees' responses in a consultation exercise. In part this raises the familiar question of the moment when the exchange of information and then consultation become obligatory. Distrust soon becomes apparent in workforces where "consultation" is little more than notification of a decision already taken, and where "dialogue" reveals closed minds. In English law this issue has revealed a fundamental and unresolved dispute concerning the role of consultation and the extent of the influence the representatives might expect.

A difficulty in English law lies in the dissonance in drafting between art. 2 of the Collective Redundancies Directive 98/59 and the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A) (as amended).<sup>84</sup> TULR(C)A 1992 obliges an

employer to consult with representatives of those affected by the dismissals when he or she is "proposing to dismiss",<sup>85</sup> whereas the Directive requires consultation where dismissals are "contemplated". An employer may contemplate redundancy even where a number of options are being considered; a proposal arises where there is a specific proposal to declare redundancies even if an alternative proposal might be available.<sup>86</sup> Since a "proposal" to consult only emerges at a later stage in the decision making process than when redundancies are "contemplated" it suggests that the employees' influence in that decision is restricted to that extent.

Consultation must take place with a view to reaching agreement,<sup>87</sup> but any agreement is more difficult to achieve in relation to proposals that have reached a developed state. Consultation at the formative stage is also important because the range of options at that point may be richer than may be the case at a later stage in the planning process. This must be a matter to be addressed if "partnership" requires a more full engagement between labour and capital.

In this respect the proposed Directive may offer little comfort. According to Art. 4 (3) the appropriate time for the delivery of information is that which enables the employee's representatives to "conduct an adequate study and....prepare for consultation". Art. 4 (4) is even more opaque since it merely requires consultation to take place at an appropriate time and at an appropriate level of representation and management. It is regrettable, however that the matter was not more fully elucidated in the text of the Directive. It seems that the member states have been left with considerable discretion to resolve the interpretative ambiguity of the appropriate times for information delivery and consultation. The development of consultation rights in

English law arguably betrays concern that the partnership ambitions of the Directive could be at risk by the adoption of a date later than the formative stage for mandatory consultation.

Other proposed reforms to fair procedures also raise questions about the extent of the true commitment to partnership on the part of Government. In particular some provisions of the Employment Bill 2001 that are intended to weaken procedural protection in dismissal cases give cause for concern. It is true that failure to observe the proposed new minimum standards leads to an automatically unfair dismissal, but the re-introduction of the “no difference” rule from *British Labour Pump v Byrne*<sup>88</sup> is open to the familiar objections that tribunals will be forced to hypothesise about the range of information that an employer might have had following a procedure that did not actually take place. The purpose of adherence to procedural minima was precisely to avoid this speculative undertaking. Since the widely drawn permissible reasons for dismissal impose few controls on employers’ behaviour, most rational decisions to dismiss will be *prima facie* fair, so that the protection against unfair dismissal arguably lies for most purposes in procedural safeguards. A declining commitment to procedural justice does little for the dignity of employees in the workplace.

But this does not conclude the issue, since the weakening of procedural safeguards goes beyond restoring the “no-difference” rule. Proper investigations, opportunities to make representations and opportunities to improve or to accept change have been established as minimum acceptable safeguards in dismissal cases; and the burdens they impose are not onerous ones. Schedule 2 of the Bill requires the employer to meet the employee, but partnership would be enhanced if the requirement for

consultation were made express. The problem with the Bill as drafted is that it omits any mandatory content for the meeting. Small employers, in particular, may interpret these open-textured procedures as simply requiring an opportunity to warn rather than to consult.

A further objection arises with the modified disciplinary procedure, the core duties of which require the employer merely to notify the employee of the reason for the dismissal and inform them of a right of appeal.<sup>89</sup> It is difficult to understand why the procedural safeguards should be overridden in cases of gross misconduct where this modified procedure will be substituted. There are two major concerns. First, the proposed changes pose the question whether tribunals will need to identify gross misconduct *in fact* before the modified procedure applies, or whether the employer's honest but mistaken belief that conduct is gross misconduct suffices. Second, the modified procedure will also place the onus on employees to endure dismissal and then institute an appeal before the opportunity to offer mitigation arises. This is so because the new standards remove from the dismissal decision all surrounding circumstances that would otherwise tend to explain, mitigate or reduce the severity of the offence. For example, an employee may actually be guilty of fighting, but may have been provoked to fight. Under the current good practice the fact of provocation should become known and taken into account by the employer prior to dismissal decision. The proposal is structured so that the fact of provocation need not be revealed until the appeal. The partnership ideal would have revealed this information at the earlier stage, importantly, to avoid the dismissal, thereby preserving trust and confidence within a continuing working relationship.



#### 4.4 Re-Contractualisation and the Dignity of the Worker

If the essence of the partnership model is the greater emphasis upon shared goals and the maintenance of a successful and harmonious working relationship there must necessarily be an emphasis upon ensuring the dignity of the worker. In its absence, the treatment of labour as a commodity can only invite resentful and perfunctory attitudes to job performance. This is inimical to the need to work towards more innovative products made to a higher quality in ever more efficient environments. As we have seen, the willingness to innovate, to accept flexibility, and to share knowledge requires a more co-operative and committed approach. Employees are expected to go beyond obedience to orders falling within the scope of their contracts. Partnership is more likely to be achieved by the transition from traditional low trust employment models to those of higher trust. In these latter types in which employees are set targets and are accountable for reaching them, the manner in which the target is met is, within limits, a matter for employees exercising skilled judgment. A greater respect for the dignity of workers, as much as respect for their professional judgment is central to the greater mutuality underpinning partnership. The desired aims of partnership will not be realised without a commitment to better working conditions and practices.

The courts have recognised their role in stamping out harsh or unacceptable employment practices. As Lord Steyn so pertinently observed in *Johnson v Unisys Ltd.*,<sup>90</sup> the need for greater protection for employees, legislated within a new scheme

of implied terms within the contract of employment has become necessary because of the “greater pressures on employees” caused by the “progressive de-regulation of the labour market, the privatisation of services, and the globalisation of product and financial markets.” In this context Douglas Brodie's important work on the expansion of the implied contractual duty to maintain trust and confidence<sup>91</sup> identifies a fundamental shift in the judicial approach to the employment relationship.<sup>92</sup> The project to enhance “mutual trust” has also appealed to policy makers at European level although, at present, the emphasis is upon procedural rather than substantive guarantees.<sup>93</sup>

English common law developments in trust and confidence have had far reaching benefits: employers have a duty to take prompt action to dispel the causes of potential conflict, not to act dishonestly or irrationally, to protect the dignity of the worker, especially to avoid humiliation, and to provide a safe and comfortable working environment.<sup>94</sup> Discretionary contractual powers have also been regulated by decisions that prevent their irrational use<sup>95</sup> and ensure their use for the purposes and within the limits intended by the parties rather than opportunistically.<sup>96</sup> This reveals a significant (but not unrestricted<sup>97</sup>) extension of common law employment rights which, although arguably undertaken in pursuit of a different policy agenda, is central to realising the partnership model.

But there remain difficulties. Notwithstanding *Taylor v Secretary of State for Scotland*,<sup>98</sup> the courts appear to remain cautious in binding employers to promises formally delivered to employees notwithstanding that these are deliberately intended

to motivate and to retain them. Accordingly, employers may be able to disregard these formally volunteered promises at will.<sup>99</sup> There is, as yet, no English common law development that would permit the enforcement of promises contained, for example, in formal statements of policy. Rights and expectations held out within these policies can be withdrawn, even whilst the policy is in force unless incorporated expressly or impliedly within the contract of employment.<sup>100</sup>

A rule which permits an employer to induce the employee to rely on a promise from which the employer later resiles with impunity must be detrimental to the enhanced trust which must lie at the heart of the partnership approach. The courts have already imported from public law into the employment relationship the concept of a legitimate expectation.<sup>101</sup> Perhaps within the implied term relating to trust and confidence there may be scope for further developments based upon proportionality. This might direct the courts to have regard to whether the employer's commercial reason for departing from a promise was sufficiently important to justify resiling from it, and whether that action is rationally connected with the employer's commercial objective.<sup>102</sup> These tests may go some way to achieving a compromise between the employer's demand for commercial freedom and the employee's interest in the security of a formal promise in respect of which reliance had, in effect, been invited.

The need to strike a fairer compromise is also suggested by the principles governing the unilateral modification of the contract of employment. The common law notoriously failed to develop a model of the contract of employment that could accommodate the need for unilateral change. Its insistence that the employee has the

right to insist on performance of entitlements created by the contract is commercially unsound in a long-term contract where parameters are bound to change. Employers should not be forced to dismiss, and place at risk mutual trust, in order to achieve necessary change. The courts have been forced to adjudicate on change (i.e. dismissals for change) through SOSR.<sup>103</sup> This, as is well known, gives little weight to transaction security. The employee's rights are essentially process rights: for example, the right to be warned that dismissal will occur if a change is not accepted.<sup>104</sup> There is no additional requirement, as there might be if greater protection for employees was required by the partnership agenda, for the employer to act proportionately in the manner described above, and not to withdraw a greater benefit from the employees than the commercial circumstances of the employer necessarily demanded.

## **5. Conclusion**

Commitment to the values of partnership entails a number of reforms broadly addressing the quality of working life, the dignity of workers, mechanisms for promoting the sharing of information, participation in decision-making and, in place of job security, employment security achieved by enhanced employability. Most importantly there is also the question of sharing rewards, in particular rewards for innovation.

Whilst the common law has revealed some creativity in its re-alignment of the balance between capital and labour, this has most notoriously been mediated through the expanded implied terms. There are, however, limitations to what the common law has so far achieved. For example, the implied term requiring training is merely an obligation to serve the immediate needs of the employer; it does not go further to address the interests of the employee in developing marketable skills. Equally, there has been little enthusiasm for interference in employers' pay policies, leaving employers largely unhindered in, for example, the criteria for the payment of discretionary bonuses. If the courts have now accepted that employees have far more than a financial interest in their employment it seems there is potential for further reforms that are consistent with recent judicial activism in the field of implied terms.

If it were more vigorously committed to reform the common law might be capable of developing certain principles more supportive of the partnership agenda. More sophisticated mechanisms might be evolved in a variety of contexts such as that supporting the flow of information within the enterprise and, as we have seen, the re-allocation of risk. Proportionality principles extended from the public law field might also provide a more just device for mediating between the interest of employees in maintaining contractual entitlements and the employer in varying them.

The major burden of implementing the partnership model must, however be placed upon Government. If it were fully committed to the early implementation of a partnership agenda it could achieve this only by legislative means. The Employment Bill presented an important opportunity, but it was not fully grasped. This invites the

criticism that the enthusiasm for partnership is illusory beyond the field of discrimination law, the initiative for which is often prompted by the need to comply with directives of the EC. Transparent and just pay policies transcend the issue of equality between sexes. Even the limited reform that requires questionnaires in claims brought by part time workers and those on fixed term contracts has not been addressed. A requirement to permit training, perhaps a right to time off, is fundamental to enhanced economic security for employees. Its absence reveals a lack of concern that redundancy can inflict long-term unemployment because of a lack of skills.

The most obvious need for statutory reform is the Patents Act 1977 the provisions of which lie uncomfortably with the stated enthusiasm for stimulating innovation. The present scheme is fatally undermined by the judicial interpretation of the requirement for an outstanding benefit as much as it is by the limited mechanisms for re-distributing the profits derived from the patent.

The ideals of partnership are far removed from the daily working experiences of many employees notwithstanding that it has, as one of its purposes, the improvement of living standards for all. But this is not all. Concern must also be expressed that the hesitation of Government to do all that is necessary to match its rhetoric poses the fundamental question whether the UK will achieve and maintain the necessary competitiveness in the globalised market place. The Government's failure to drive the partnership agenda forward suggests a thinly disguised lack of commitment to this model of employment relations, and the limited scope of the Employment Bill in this respect suggests that this is unlikely to change.

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<sup>1</sup> Opportunity for All in a World of Change, White Paper, (London: Department of Trade and Industry, 2001) Cm 5052 <http://www.dti.gov.uk/opportunityforall/index.html>. para. 1.8. See also the Secretary of State for Trade and Industry, Ms P Hewitt, moving the Second Reading of the Employment Bill 2001, HC Debs. Nov 27<sup>th</sup> 2001, col. 864, "...our priority is now to deliver a high-skill, high productivity economy. Productivity.....is about skilled people in high-performance workplaces, where employers and employees work together in an effective partnership."

<sup>2</sup> Productivity in the UK, (London: HM Treasury, 2000). There is some evidence that competitive advantage can be acquired where "partnership" techniques are deployed. A poll of over 2,000 organisations holding "Investors in People" status found that 70 per cent had increased competitiveness, 70 per cent had increased productivity and 80 per cent had increased customer satisfaction: Opportunity for All in a World of Change, above n1, para 2.41.

<sup>3</sup> Opportunity for all in a World of Change, above n1, para 1.14.

<sup>4</sup> 2001/63/EC: Council Decision of 19 January 2001 on Guidelines for Member States' employment policies for the year 2001; see also Recommendation, 2001/64/EC.

<sup>5</sup> The European Employment Strategy and its relationship with other aspects of competition and tax policy is discussed by S Ball in "The European Employment Strategy: the Will but not the Way?" (2001) ILJ 353.

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<sup>6</sup> Department of Trade and Industry, London, 1998 Cm 3968 para. 1.9.

<sup>7</sup> A Swedish study revealed an increased risk of early death for those who worked longer than five hours overtime: <http://content.health.msn.co.uk/content/article/3422.1602> of Jan 11, 2001.

<sup>8</sup> GDP per head of population in the UK is 21% below G7 average. In part this may be due to a lack of investment, but other motivational factors may well have had some effect: Competitiveness Indicators (2nd edition: 2001) <http://www.dti.gov.uk/opportunityforall/indicators2/index.htm>.

<sup>9</sup> White Paper, Our Competitive Future: Building the Knowledge Driven Economy (Department of Trade and Industry: London, 1998) [http://www.dti.gov.uk/comp/an\\_reprt.htm](http://www.dti.gov.uk/comp/an_reprt.htm) esp. para. 1.11-1.13. See also Fairness at Work, (London: Department of Trade and Industry, 1998) Cm 3968 para. 1.1.

<sup>10</sup> The UK economy seems to enjoy continuing success in this respect since the Government's Competitiveness Indicators (2nd edition: 2001) above n8, reveal that the UK was the second largest recipient of inward investment.

<sup>11</sup> E.g., the lowest level of corporation tax in the major industrialised countries: Maintaining Economic Stability, section 4.4 (London: HM Treasury, December 2001)

<sup>12</sup> Competitiveness Indicators, above n8 at chapter 2.7.

<sup>13</sup> The prevalence of peripheral workers on part time or fixed term contracts suggests a return, to that extent, of a return to 'transaction' rather than 'relational' contracts and may have a negative effect on partnership ideals. See, e.g., J Stredwick and S Ellis, "Flexible Working Practices: Techniques and Innovations", (London: IPD, 1998) at p. 282. The Government still appears to be committed to having workers offer their labour through "diverse" relationships: Competitiveness Indicators, above n8.

<sup>14</sup> See S. Deakin and H Reed, "The Contested Meaning of Labour Market Flexibility: Economic Theory and the Discourse of European Integration" in J Shaw (ed) Social Law and Policy in an Evolving European Union (Oxford: Hart, 2000) 71.

<sup>15</sup> Part time working has increased. These workers comprised about 20% of the workforce in 1984 and about 25% by 2000, Competitiveness Indicators, above n8.



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- <sup>16</sup> E.g., in the sales and financial service sector evening, weekend or even 24 hour opening is not uncommon.
- <sup>17</sup> Council Decision 2001/63 2001 OJ L22/18.
- <sup>18</sup> See Opportunity for All etc., above n1.
- <sup>19</sup> Prof H Collins, provides an excellent study of the effects of partnership in “Regulating the Employment Relation for Competitiveness” (2001) 30 ILJ 17.
- <sup>20</sup> Opportunity for All, etc., above n1 at para 1.11.
- <sup>21</sup> Fairness at Work (London: Department of Trade and Industry, 1998) Cm 3968 para 1.8.
- <sup>22</sup> See Employment Relations Act 1999, s.30.
- <sup>23</sup> Department of Trade and Industry Press Release announcing winners of third round, 7th August 2001.
- <sup>24</sup> But profit is not always the reason for the partnership model; some companies regard it as having a moral value for its own sake. Some have revealed very significant increases in profit and turn-over not explained by market growth: Dr J. Krell, Partnership at Work, Employment Relations Research Series No 7 London: Department of Trade and Industry ,1999).
- <sup>25</sup> Guest D., and Peccei R., The Partnership Company: Benchmarks for the Future, (London: Involvement and Participation Association, 1998) cited in J. Krell Partnership at Work, *ibid.*, at p.9.
- <sup>26</sup> Labour Force Survey April-June 2001 reveals that the working age employment rate stands at 74.8%. In the Budget of 2001 the Government defined full employment as 75%. See also para 3.7 of the Kingsmill Report, [www.kingsmillreview.gov.uk](http://www.kingsmillreview.gov.uk).
- <sup>27</sup> Above n 25 at p.23 Table 4.
- <sup>28</sup> Guest and Peccei’s survey also suggested that the benefits of partnership can be one sided and that employees do not share their managers’ views that fair treatment has resulted from partnership. See e.g at p. 32.
- <sup>29</sup> Our Competitive Future: Building the Knowledge Driven Economy, above n9 at para. 2.10.
- <sup>30</sup> An IDS Press Release of 31.10.01 states: "In those companies where a comparison is possible, the basic salaries of FTSE 100 chief executives went up by 14.8 per cent on average. When bonuses are

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also taken into account, movements in total cash were even higher. The average total cash increase for FTSE 100 chief executives was 18.3 per cent." In contrast, the Autumn 2001 pay round suggests that the annual pay increase for employees is normally in the region of 3-4% although the increase in October 2001 of the minimum wage has raised the pay of the lowest paid workers by around 10%. See IDS Report 845, Nov 2001. The Government's announcement that shareholders will acquire the right to vote on directors' pay suggests recognition that there is a problem with excessive pay rises in senior management.

<sup>31</sup> Department of Trade and Industry Press Release, 19.10. 2001.

<sup>32</sup> From 1st October 2001 the adult gross minimum rate for workers aged 22 or more has been £4.10 per hour. The youth rate is £3.50 (raised from £3.20). The Government has indicated that the adult rate will rise to £4.20 from 1st Oct 2002 "subject to prevailing economic conditions". The Low Pay Commission has argued that the adult wage should apply at the age of 21 but this appears to have been rejected.

<sup>33</sup> *Secretary of State v ASLEF No.2* [1972] 2 QB 455; *BT v Ticehurst* [1992] IRLR 219.

<sup>34</sup> *Murco Petroleum v Forge* [1987] IRLR 50. Sir Ralph Kilner Brown, delivering the judgment of the EAT thought that an implied right to a pay rise was alien to our collective bargaining structure and would not be welcomed by either side of industry; in particular, trade unions would regard it as undermining their authority. Does this premise survive the severe decline in collective bargaining activity?

<sup>35</sup> *F C Gardner v Beresford* [1978] IRLR 63

<sup>36</sup> E.g., *Murco Petroleum v Forge* [1987] IRLR 50.

<sup>37</sup> Remarkably, the motivation for this reform is tribunal efficiency rather than individual entitlement: para 95 of explanatory notes, <http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmbills/044/en/02044x--.htm>.

<sup>38</sup> Although, when in force, the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 will allow employees to demand written reasons from the employer purporting to justify differential treatment: draft reg.5. A similar right extends to part time employees under reg. 6 of

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the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, 2000/1551.

Neither right is, of course, an equivalent to a right to serve a questionnaire.

<sup>39</sup> Arguably giving priority to one group, in this case, female workers, overlooks a more general need for transparency in decision making in employment.

<sup>40</sup> The Review can be found at [www.kingsmillreview.gov.uk](http://www.kingsmillreview.gov.uk). The issue of discretionary bonus payments is discussed by Douglas Brodie, "Legal Coherence and the Employment Revolution" (2001) 117 LQR 604 at 611-613.

<sup>41</sup> *Clark v BET plc* [1997] IRLR 348. In this case the relevant term stated that the employee's salary "shall be reviewed annually and be increased by such amount, if any, as the board shall in its absolute discretion decide." The amount was to be calculated by a pay comparability exercise. This was held to confer a duty on the employer to make an increase, and only the amount of the payment was discretionary the discretion. This payment was to be determined by taking into account factors that ought to have been considered had the employer acted in good faith.

<sup>42</sup> *Powell v Braun* [1954] 1 All ER 484.

<sup>43</sup> In the design of bonus schemes it seems that any provision that is not in breach either of the anti discrimination legislation, an express term, or the implied term of trust and confidence would be lawful

<sup>44</sup> And it is noteworthy that even Kingsmill considered it desirable that pay reviews in the private sector should be undertaken voluntarily.

<sup>45</sup> *Cresswell v Board of the Inland Revenue* [1984] ICR 508. In the context of unfair dismissal, if the employer fails to provide instruction and training where the employee is required to perform new duties any dismissal for incompetence would normally be unfair.

<sup>46</sup> Cl. 43 of the Employment Bill 2001.

<sup>47</sup> Opportunity for All etc., above n1.

<sup>48</sup> It is not proposed to discuss in this context the limited protection available to employers by including covenants in restraint of trade in the contract of employment, nor the principles restraining employees from working during "garden leave". See e.g., *Symbian Ltd v Christensen* [2001] IRLR 77. The approach to validity of garden leave clauses is not unlike that applied to express restraint clauses. Much depends upon the nature of the business interest the employer seeks to protect and it is not

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generally sufficient if the motive is merely to prevent competition from the employee: e.g., *Provident Financial Group plc v Hayward* [1989] 3 All ER 298 and *William-Hill Organisation Ltd v Tucker* [1998] IRLR 313.

<sup>49</sup> *British Syphon Co Ltd v Homewood* [1956] 2 All ER 897.

<sup>50</sup> This conclusion can be derived from the principles established in *Reading v A-G* [1951] AC 507.

<sup>51</sup> *British Celanese v Moncrieff* [1948] Ch 564.

<sup>52</sup> *Byrne v Statist Co.* [1914] 1 KB 622. But if a lecturer employed to give lectures, for the sake of convenience, makes notes for the purpose of delivering those lectures, the employer does not acquire copyright to them: *Stevenson, Jordan & Harrison v MacDonald & Evans* (1952) 1 TLR 101, esp., at p. 111 *per* Denning LJ.

<sup>53</sup> Copyright Act 1956, s.4 and *Beloff v Pressdram Ltd* [1973] 1 All ER 241. This part of the 1956 Act is substantially re-enacted in the Copyright, Designs and Patents Act 1988, s.11, which was amended by SI 1996/2967.

<sup>54</sup> s.39 and *Reiss Engineering v Harris* [1985] IRLR 232 *obiter*, Falconer J.

<sup>55</sup> *Reiss ibid.*

<sup>56</sup> Such as the "invitation" to do research in *Re: Greater Glasgow Health Board's Application* [1996] RPC 207.

<sup>57</sup> *Re: Greater Glasgow Health Board's Application*, *ibid.*

<sup>58</sup> [1996] RPC183. Noted by P. A. Chandler, "Employees' inventions: inventorship and ownership" (1997) 19 EIPR 262-266.

<sup>59</sup> s.40 allows compensation for outstanding benefits obtained from the patent, not from the invention *per se*.

<sup>60</sup> *Re: Staeng Ltd's Patents*, above n58.

<sup>61</sup> *British Steel's Patent* [1992] RPC 117

<sup>62</sup> *Memco-Med's Ltd Patent* [1992] RPC 403.

<sup>63</sup> *Memco-Med's Ltd Patent* [1992] RPC 403, doubting, *GEC Avionics Patent* [1992] RPC 107 on this point.

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<sup>64</sup> *British Steel's Patent* [1992] RPC 117.

<sup>65</sup> *GEC Avionics Patent* [1992] RPC 107.

<sup>66</sup> Above n64.

<sup>67</sup> *GEC Avionics Patent* [1992] RPC 107.

<sup>68</sup> See, P A. Chandler, "Employee Inventions: Outstanding Compensation" [1992] JBL 600.

<sup>69</sup> Above n22.

<sup>70</sup> We are concerned with information of which the employee is actually aware. However, in the absence of other more onerous contractually enforceable performance standards the implied duty of reasonable competence would determine how far the employee was obliged to go to discover information that they would then be bound to disclose.

<sup>71</sup> *Harmer v Cornelius* (1858) 5 CB (NS) 236.

<sup>72</sup> *Harvey v O'Dell* [1958] 1 All ER 657.

<sup>73</sup> *Lister v Romford Ice and Cold storage Co. Ltd* [1957] AC 555

<sup>74</sup> *Nottingham University v Fischel* [2000] IRLR 471.

<sup>75</sup> *British Syphon Co Ltd v Homewood* [1956] 2 All ER 897.

<sup>76</sup> *Cranleigh Precision Engineering v Bryant* [1964] 3 All ER 289.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Scallly v Southern Health and Social Services Board* [1991] IRLR 478 is a welcome development on disclosure. The duty applies to contingent benefits where employees have not negotiated their own contracts. However, the courts seem unwilling to extend it to embrace a wider obligation of disclosure, almost certainly to avoid forcing employers into providing advice outside the scope of their business or expertise: see, e.g., *University of Nottingham v Eyett* [1999] IRLR 87.

<sup>79</sup> *Reid v Rush & Tomkins Group plc* [1989] IRLR 265. Discussed by Prof. H. Collins (1992) 55 MLR 556. It is noteworthy that the decision not to imply the term was justified on the grounds that the terms was not "necessary". Other techniques for the implication of terms were not considered.

<sup>80</sup> If, after *Waters v Metropolitan Police Commissioner* [2000] 1 WLR 1607, the employer has a duty in contract and tort to protect an employee against harassment or victimisation likely to cause physical

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or psychiatric injury, it would seem arbitrary to exclude a duty to protect the employee from unreasonable risk by the provision of information which is in the employer's possession and which it is not unreasonable to disclose.

<sup>81</sup> See Guest and Peccei above n25 at p. 25. *Henry v London General Transport Services* [2001] IRLR 132 also reveals that customary bargaining arrangements can bind individual dissenters notwithstanding the absence of an express "bridging" mechanism designed to allow the collective agreement to take effect in the individual contract of employment. Decisions such as these weaken the position of individuals.

<sup>82</sup> Common Position (EC) No 33/2001 of 23 July 2001 adopted by the Council with a view to adopting a Directive of the European Parliament and of the Council establishing a general framework for informing and consulting employees in the European Community, Official Journal C 307, 31/10/2001 P. 0016 – 0026.

<sup>83</sup> English law, influenced by EC law in this respect, had been moving in this direction. In *GMB v Man Travel and Bus Co. UK* [2000] IRLR 636 it was held that "dismissal as redundant" in s.195 Trade Union and Labour Relations (Consolidation) Act 1992 must, under EC law, be given a wide meaning embracing cases where no jobs are actually lost.

<sup>84</sup> Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1999 SI No. 1999/1295. The EAT has recently held that s.188 cannot be construed so as to accord with the Collective Redundancies Directive. This implies that the UK must be considered to be in breach of its obligations under EC law: *MSF v Refuge Assurance plc* [2002] IRLR 324. The relevant time for commencing consultation will depend on whether the affected employees are employed in the private or public sector.

<sup>85</sup> This was interpreted in *R v British Coal Corporation ex p Vardy* [1993] IRLR 104 as arising when the employer has formed an intention to declare redundancies.

<sup>86</sup> *Scotch Premier Meat Ltd v Burns* [2000] IRLR 639.

<sup>87</sup> This means that there must be genuine consultation with a view to reaching agreement about all matters listed in s.188 (2) (a)-(c) including on the question of whether to declare redundancies at all. An employer who has already decided that redundancies are inevitable and for whom consultation on

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this point is a “sham” breaches his or her obligations under s.188: *Middlesbrough Council v TGWU* [2002] IRLR 332.

<sup>88</sup> [1979] ICR 347.

<sup>89</sup> See s.29 and Part 1 of Schedule 2 of the Employment Bill 2002, most notably chapter 2, step 1 relating to dismissal and disciplinary procedures.

<sup>90</sup> [2001] UKHL 13; [2001] 2 WLR 1076, 1091.

<sup>91</sup> Douglas Brodie, “Mutual Trust and the Values of the Employment Contract” (2001) 30 ILJ 84; “Legal Coherence and the Employment Revolution” (2001) 117 LQR 604; “Beyond Exchange: the New Contract of Employment” (1998) 27 ILJ 79; “The Heart of the Matter: Mutual Trust and Confidence” (1996) 25 ILJ 121.

<sup>92</sup> This received, of course, much emphasis in the House of Lords in *Malik v BCCI* [1997] IRLR 462 where, for example, Lord Nicholls, in a dictum typical of the new approach stated at p. 464 that: “. the purpose of the trust and confidence implied term is to facilitate the proper functioning of the contract.” Lord Steyn at p.468, also observed that the trust and confidence term derives from “the (recent) change in legal culture”.

<sup>93</sup> See para. 7 of the Preamble to the Information and Consultation Directive.

<sup>94</sup> The issues and relevant law are considered by Hough and Spowart-Taylor, “A Common Law Agenda for Labour Law” [1999] Web Journal of Current Legal Issues, <http://webjcli.ncl.ac.uk/1999/issue2/hough2.html>.

<sup>95</sup> *McLory v Post Office* [1993] IRLR 159.

<sup>96</sup> *Aspden v Webbs Poultry and Meat Group (Holdings) Ltd* [1996] IRLR 521. The issue is discussed by B. Hough and A. Spowart-Taylor, “A Common Law Agenda for Labour Law” [1999] Web Journal of Current Legal Issues, above n94.

<sup>97</sup> Managerial prerogative has, for example, been strengthened so as to bestow greater powers to defeat industrial action, *ibid.*

<sup>98</sup> [2000] IRLR 502

<sup>99</sup> *Grant v SW Trains* [1998] IRLR 188. Cf *Taylor v Secretary of State for Scotland* [2000] ILR 502.

<sup>100</sup> *Grant*, *ibid.*.

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<sup>101</sup> *French v Barclays Bank plc* [1998] IRLR 646; see also *R v British Coal, ex p. Vardy* [1993] ICR 720 concerning a legitimate expectation of consultation.

<sup>102</sup> See, in the Public Law context, *R v Secretary of State for the Home Department ex p Daley* [2001] 3 All ER 433 and *De Freitas v Permanent Secretary of Ministry of Agriculture, Lands and Housing* [1999] 1 AC 69.

<sup>103</sup> In seeking to establish the fairness of the dismissal the employer must demonstrate a fair reason for it. The Employment Rights Act, s.98 identifies a number of *prima facie* fair reasons including, for example, misconduct or redundancy. It further provides that an employer who cannot establish one of the reasons identified in s.98 can advance “some other substantial reason of a kind... to justify the dismissal” (SOSR). Business re-organisation has been found to fall within the SOSR category: *RS Components Ltd v Irwin* [1973] ICR 535

<sup>104</sup> *RS Components Ltd v Irwin*, *ibid.*